Supreme Court, U.S.
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No. 98-1326

In the Supreme Court of the United States

OCTOBER TERM, 1998

RITA GLUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* TEXAS JUSTICE FOUNDATION IN SUPPORT OF THE PETITION

THOMAS M. FISHER
300 North Meridian Street
Suite 2700
Indianapolis, Indiana 46204
(317) 237-0300

1827

QUESTION PRESENTED

Whether, in light of this Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), Congress' power "to regulate Commerce * * * among the several states" (U.S. Const. art. I, § 8, cl. 3), includes the authority to create the national domestic-relations crime of "interstate domestic violence" contained in the Violence Against Women Act of 1994, 18 U.S.C. § 2261(a)(1).

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INTEREST OF THE *AMICUS CURIAE*[1]

The Texas Justice Foundation is a nonprofit corporation that provides free legal representation in cases involving the protection of individual rights and cases that seek to limit government to its proper role. *Amicus* is deeply concerned about federal government interference in matters of local crime control. It believes that, under the Constitution and the principles of federalism that it embodies, the prosecution and punishment of ordinary criminal offenders are matters of state and local government responsibility. This Court's holding in *United States v. Lopez*, 514 U.S. 549 (1995), provides an important safeguard against invalid federal interference with state and local efforts to control crime. In addition, the Domestic Violence Clause of Article IV of the Constitution reinforces the need to give vigilant scrutiny to any attempt to federalize violent crime.

This case involves the Violent Crime Control And Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, Title IV of which is known as the Violence Against Women Act (VAWA). A provision of VAWA creates the new federal crime of "interstate domestic violence." 18 U.S.C. § 2261 (a)(1). The statute turns murder, among other forms of violent conduct, into a federal crime where (i) the victim is the murderer's spouse or "intimate partner" and (ii) a state line is crossed. The statute does not explicitly require any connection between the crime and commerce, and there is no basis on which to conclude

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[1] Counsel for both parties have consented to the filing of this brief, and *Amicus* has filed their consents with the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

that this sort of crime substantially affects interstate commerce. In view of the implications of the Domestic Violence Clause and the uncertainty surrounding application of *Lopez*, *Amicus* believes that this case provides the Court with an excellent vehicle for reviewing the constitutionality of this new crime.

Article IV's Domestic Violence Clause Implicitly Acknowledges Constitutional Limits on Legislative Attempts to Federalize Control of Violent Crime

Article IV, § 4 of the Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, § 4. *Amicus* urges this Court to consider the impact of the proviso that "The United States shall . . . protect each of them . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence" ("Domestic Violence Clause") on Congress' power to enact federal criminal legislation. Though the Court has held that the Government's obligations under The Domestic Violence Clause are not justiciable, *see Luther v. Borden*, 48 U.S. (7 How.) 1, 42-43 (1848), it has not thoroughly considered the impact of the Domestic Violence Clause on the limits of federal power. This case presents the Court with an opportunity to address the meaning of the Domestic Violence Clause and its implications for the limits on federal power.

Recent scholarship offers important insights into how the Domestic Violence Clause imposes, or at least acknowledges, substantive limits to Congress' enumerated powers. In his article *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 4 (1997), Professor Jay S. Bybee outlines the role the Domestic Violence Clause plays as a "Tenth Amendment for crime." According to Professor Bybee, the Domestic Violence Clause was motivated primarily by lingering concerns over Shays' Rebellion. *Id.* 19-21. It provides an "independent justification for demanding that Congress demonstrate that it has not displaced the criminal authority of the states when it legislates against crime in the states." *Id.* at 81.

The impact of the Domestic Violence Clause on the limits of the commerce power is especially important with respect to the constitutionality of VAWA. In a very recent *en banc* decision, the Fourth Circuit held that VAWA exceeded Congress' authority under the Commerce Clause in providing a cause of action against any "person . . . who commits a crime of violence motivated by gender." *Brzonkala v. Virginia Polytechnic Institute*, No. 96-1814 (*en banc*), slip op. at 8 (4th Cir. 1999) (reviewing 42 U.S.C. § 13981(c)). Writing for the majority, Judge Luttig discussed insightfully the distinction between violence and commerce: "[V]iolent crime motivated by gender animus . . . [n]ot only is . . . not commercial, it is not even economic in any meaningful sense." *Id.*, slip op. at 20. In fact, limiting the reach of VAWA to crimes motivated by gender "excludes from its purview those violent crimes most likely to have an economic aspect — crimes arising solely from economic motives — and instead addresses violent crime . . . relatively unlikely to have any economic character at all." *Id.*, slip op. at 21. The Fourth Circuit expressed additional suspicion of VAWA because "domestic violence [is] a type of violence that, perhaps more than any other, has traditionally been regulated not by

Congress, but by the several States." *Id.*, slip op. at 36. The Domestic Violence Clause, because it acknowledges that control of violent crime is reserved to the states, reinforces the Fourth Circuit's suspicion.

The law at stake here proscribes activity — violence against one's spouse or "intimate partner" — with as complete a disjunction with commerce as that at stake in *Brzonkala*. *See* 18 U.S.C. § 2662(a)(1). Yet, unlike the Fourth Circuit in *Brzonkala*, the lower courts here did not review Congress' commerce power justifications for enacting VAWA with anywhere near the level of skepticism that the Court established as the standard in *United States v. Lopez*, 514 U.S. 549 (1995). *See* Pet. App. 9a-10a. The Domestic Violence Clause reinforces the *Lopez* decision's skepticism, and the Court should grant certiorari in this case to consider the limitations the Domestic Violence Clause acknowledges on federal power to control violent crime.

A. The Domestic Violence Clause Applies To Violent Crime

The Domestic Violence Clause provides constitutional authority for federal government protection against domestic violence, a subset of which is proscribed by the federal crime of "interstate domestic violence." *Amicus* does not suggest that when the Framers included the Domestic Violence Clause in the Constitution they necessarily had in mind the exact sense in which the term "domestic violence" is used in VAWA. VAWA uses the term "domestic violence" in the sense of spousal or "intimate partner" abuse. 18 U.S.C. § 2261(a)(1). "Domestic" under this statute largely, though not exclusively, refers to a household. *See* 18 U.S.C. § 2266 (defining "spouse or intimate partner" as one "who shares a child in common with the abuser" or "cohabits or has cohabited with the abuser as a spouse"). Under the Domestic

Violence Clause, "domestic" no doubt refers to a sphere of violence larger than, but including, household violence.

Because the Domestic Violence Clause addresses a larger range of violence than VAWA, it plainly covers overlapping instances of violent conduct, such as murder and other violent crimes against people and property. *See* 18 U.S.C. § 16 (defining "crime of violence" in part as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"). When adopting the Domestic Violence Clause, in fact, the Framers refused a last-minute amendment to substitute the term "insurrections" for "domestic violence," a change that would have limited it to violence directed against the state itself. Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 34. The Framers' rejection of "insurrections" in favor of "domestic violence" implies that they intended the clause to apply to all violent crime. *See id.* at 39-40.

Some Federalists may have understood the Domestic Violence Clause to cover only insurrection violence, or "crime against government qua government." *Id.* at 39. However, early commentators such as St. George Tucker, William Rawle, Joseph Story, and Thomas Cooley understood "domestic violence" to refer to crimes other than insurrection. *Id.* As Professor Bybee reports, Tucker emphasized the broad nature of the Domestic Violence Clause's reservation of authority:

> [E]very pretext for intermeddling with the domestic concerns of any state, under colour of protecting it against domestic violence is taken away, by that part of the provision which renders an application from the legislative, or executive authority of the state endangered, necessary to be made to the federal

> government, before it's [sic] interference can be at all proper.

1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, app. at 367, *as quoted in* Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 39. In Tucker's view, then, the Domestic Violence Clause affected all domestic *concerns*, including violent crime. *See id.* at 39-40.

Later interpretations of the Domestic Violence Clause also understood it to refer generally to violent crime. In 1857, United States Attorney General Caleb Cushing advised that "the constitutional obligation of the United States to protect each of the States against 'domestic violence'" meant that no citizen had a right to incite "domestic violence, that is robbery, burglary, arson, rape, and murder." *Yazoo City Post Office Case*, 8 Op. Atty. Gen. 489, 493-494 (1857).

Thus, the Domestic Violence Clause refers to more than just violence directed against the state. The clause does not, in contrast with the Militia Clause of article I, § 8, refer to "insurrections," a term the Framers explicitly rejected for purposes of the Domestic Violence Clause. Instead, the Framers provided for states to request federal protection even when they could not protect citizens against violent crimes directed at their citizens and their citizens' property, crimes such as murder, rape, robbery, and arson. The Domestic Violence Clause, therefore, provides the means for federal protection against the same sort of violence that the federal crime of "interstate domestic violence" proscribes.

B. The Domestic Violence Clause Presumes That The Federal Government's Enumerated Powers, Including the Commerce Clause, Provide Insufficient Justification for Congress to Control Violent Crime

Because the Domestic Violence Clause provides the means for states to apply for federal protection against violent crime, it reflects a presumptive commitment of the power to control violent crime to the states. The clause reflects the Framers' view that, in the absence of a state application for protection, Congress would have only intermittent power to control domestic violence.[2] In this vein, Alexander Hamilton warned that, without explicit constitutional guarantees of state governments, "[a] successful faction may erect a tyranny on the ruins of order and law, while no succor could *constitutionally* be afforded by the Union to the friends and supporters of the government." *The Federalist No.* 21 at 126 (Hamilton) (Modern College Library Edition) (emphasis added).

The Domestic Violence Clause, along with the Guarantee Clause and the Militia Clause, provides the constitutional basis for federal succor in circumstances not covered by the enumerated powers. In some sense it may function as a "catch all" federal power to combat violent crime, but only when a state has applied for federal

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[2] This stands in contrast to Congress' power to protect states against insurrection or foreign invasion, neither of which are conditioned upon state application. *See* U.S. Const. art. I., § 8 (providing Congress' power to call up the militia to "suppress insurrections and repel invasions"); U.S. Const. art. IV, § 4 (compelling Congress to protect states against invasion). Of course, Congress' power under Art. I, § 8 to provide for a militia to enforce the laws of the United States provides no substantive guidance as to what laws Congress has the power to enact and enforce.

protection. As Professor Bybee has stated, "This view of the Domestic Violence Clause confirms the enumerated power doctrine. . . . Although a state might believe itself overwhelmed by . . . ordinary crime, the decision whether assistance is needed, like decisions about defining and punishing crime itself, belongs to the state." Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 79.

Under this theory, the Domestic Violence Clause is meaningful only if Congress ordinarily lacks the power to intercede into matters of domestic violence on its own initiative. But under the all-encompassing theory of the Commerce Clause that prevailed below (where the district court referred to the Commerce Clause power as "exceedingly broad," Pet. App. 9a), the Commerce Clause swallows any real meaning the Domestic Violence Clause may have. Because that theory allows for congressional regulation of violent crime that is wholly unrelated to commerce, it permits Congress to intercede in matters of violent crime on the thinnest of pretexts.

The Court should take this case to review the propriety of this "exceedingly broad" theory of the Commerce Clause. Before affirming congressional authority to control violent crime based on assertions of Commerce Clause power, the Court should demand from the Government a theory of the Commerce Clause that would not render meaningless the Domestic Violence Clause's recognition that the power to control violent crime is commited to the states. In effect, the Court should presume that Congress' enumerated powers, including the Commerce Clause, do not generally support federal power to control violent crime. Professor Bybee urges the same:

> [T]he Domestic Violence Clause provides a presumption against federal preemption, co-

> option, and even duplication of state efforts to control domestic violence.

Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 81. Such a presumption is proper because the Domestic Violence Clause provides the textual basis for the understanding that, generally speaking, Congress acts beyond its enumerated powers when it purports to regulate domestic violence (without a proper request for assistance from any state).

The Court's enduring search for substantive textual guidance concerning the limits of federal power highlights the importance of concluding that such a presumption exists in the Domestic Violence Clause. In *New York v. United States*, the Court noted that, while "no one disputes the proposition that '[t]he Constitution created a Federal Government of limited powers,' . . . the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult . . . cases." 505 U.S. 144, 155 (1992) (citation omitted). The Tenth Amendment at a minimum holds the constitutional place for drawing this line, of course, but it is not reliably recognized as a source for substantive demarcation between state and federal authority. *See id.* at 156-57. In the Domestic Violence Clause, the Court should find a textual basis for defining at least in part the proper substantive limits of Congress' ability to regulate under the Commerce Clause (and other grants of power). *See* Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 4 ("The Domestic Violence Clause plays the role of a Tenth Amendment for crime.").

Furthermore, Article IV's substantive demarcation of the limits of federal power supports application of the *Lopez* decision to this case. The Court in *Lopez* properly recognized that the commerce power is inherently limited. It noted that "[u]nder our federal system, the 'States possess primary

authority for defining and enforcing the criminal law' . . . . When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Lopez*, 514 U.S. at 561, n.3 (citations omitted). *See also Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring) ("Indeed, on this crucial point, the majority and Justice Breyer agree in principle: The Federal Government has nothing approaching a police power."). Based on this "sensitive relation" in which states retain the primary authority for controlling crime, the Court held that a particular class of conduct is not subject to federal control under the commerce power unless the repetition of that conduct exerts a substantial affect on commerce. *Lopez*, 514 U.S. at 559, 567. The Domestic Violence Clause provides an independent textual basis for this holding where Congress exerts power over violent crime, and should leave no doubt that congressional enactments such as that at stake here are presumptively beyond Congress' power. *See* Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 81.

Amicus does not urge that the Domestic Violence Clause necessarily carves out of congressional power all ability to regulate domestic violence absent state application for protection.[3] This Court's decision in *Garcia v. San*

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[3] Further, *Amicus* also does not urge the Court to recognize in this case a cause of action based on any substantive rights protected by the Domestic Violence Clause. Accordingly, cases holding that Article IV generally does not provide justiciable substantive rights do not impact *Amicus*' theory that the Domestic Violence Clause implicitly recognizes substantive limitations on congressional power. *See, e.g., Luther v. Borden*, 48 U.S. (7 How.) 1 (1848) (holding that presidential discretion in exercising powers granted by the Constitution is not subject to judicial review); *Chiles v. United States*, 874 F. Supp. 1334, 1342-44 (S.D. Fla. 1994), *aff'd*, 69 F.3d 1094 (11th Cir. 1995) (holding nonjusticiable the

(continued...)

Antonio Metro. Transit Authority certainly allowed that Article IV does provide some carve-outs of state sovereignty "that Congress may not employ its delegated powers to displace." 469 U.S. 528, 550 (1985). But, though it reflects the Framers' understanding that the enumerated powers are not so extensive as to cover all circumstances where federal protection might be expedient or desirable, the Domestic Violence Clause may be theoretically consistent with Congressional power to control violent crime to the extent of Congress' enumerated powers. Further, according to Professor Bybee, although construing the Domestic Violence Clause as an excision of federal power "is a plausible reading . . . in light of the practices of the earliest Congresses and the Supreme Court's reading of the Necessary and Proper Clause, it is too late in the day to maintain it." Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 80-81. *But see*, *Lopez*, 514 U.S. at 597, n. 6 (Thomas, J., concurring) ("Notwithstanding any substantial effects that murder, kidnaping, or gun possession might have had on interstate commerce, Congress understood [at the inception of the Union] that it could not establish nationwide prohibitions.").

Amicus instead urges the more limited proposition that the Domestic Violence Clause presumes that control of violent crime is a power reserved to the states, and that Courts should view with great suspicion any congressional attempts to federalize that power. Of course, the Federal Government may overcome such a presumption in specific instances. But, "if the United States undertakes to address domestic violence on the basis of its own independent authority, it must demonstrate clear constitutional support for

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[3](...continued)
issue whether the Federal Government had violated the Domestic Violence Clause in allegedly failing to control the influx of illegal aliens into Florida).

its actions." Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 81. For example, the Federal Government may, under *Lopez*, demonstrate clear constitutional support for proscribing violent crime where that crime produces, through repetition, a substantial affect on interstate commerce. *Lopez*, 514 U.S. at 559, 567. It may also regulate a crime involving "an instrumentality of interstate commerce or a thing in interstate commerce," or it may enact a crime that "contains [a] jurisdictional element which would ensure, through case-by-case inquiry, that the [proscribed conduct] in question affects interstate commerce."[4] *Id.* at 559, 561. Congress may also overcome this presumption through the proper exercise of its other powers as well, such as its powers under Section 5 of the Fourteenth Amendment. *See* Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 80 (noting "[t]his interpretation of the Domestic Violence Clause does not disparage the effect of the Fourteenth Amendment.").

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[4] The crime of "interstate domestic violence," of course, requires in part that the government must prove that the defendant crossed a state line with the intent to engage in domestic violence. 18 U.S.C. § 2261(a)(1). If this Court's decisions in *Caminetti v. United States*, 242 U.S. 470 (1917) and similar cases are read to mean that a criminal defendant's mere crossing of a state line (without a further connection to commerce) is sufficient to support exercise of the Commerce Clause power, the Court should consider whether that line of authority is doctrinally consistent with the decision in *Lopez* that a class of activity must "substantially affect" commerce before Congress may proscribe it under the Commerce Clause. *Lopez*, 514 U.S. at 559. However, as petitioner has suggested, the Court may distinguish the *Caminetti* line of authority from the crime of interstate domestic violence on the theory that *Caminetti* referred to Congress' ability under the Commerce Clause to regulate "[t]he *transportation* of *passengers* in interstate commerce," not merely to regulate the crossing of a state line. *See* Petition for a Writ of Certiorari, p. 26 (quoting *Caminetti*, 242 U.S. at 491).

But no matter the source of federal authority, congressional controls of violent crime should, even where they purport to include a jurisdictional element, be subjected to vigilant scrutiny. *See id.* at 82 (noting that criminal statutes against violent crime enacted under the Fourteenth Amendment should be treated the same as statutes enacted under the Commerce Clause). Given the Domestic Violence Clause's recognition of substantive limitations on congressional power, the Court should not merely rubber-stamp congressional assertions of the power to enact controls over violent crime. It should instead presume that such assertions of power go beyond Congress' limited authority.

* * *

There can be little doubt that, in enacting VAWA and the crime of "interstate domestic violence," Congress meant to exact a change in the federal-state division of power. In *Brzonkala*, the *en banc* Fourth Circuit discussed at length VAWA's far-reaching implications for federalism:

> [W]hen the federal government provides a remedy for violent crime in addition to that provided by the States, it both involves itself in the punishment of such crime and increases the total penalty for such crime beyond that provided by the law of the States. Morever, this federal involvement will inescapably lead to changes in the allocation of state law enforcement and judicial resources, and even in substantive state law, by altering the underlying enforcement realities against which all such allocative and legislative decisions are made.

Brzonkala v. Virginia Polytechnic Institute, No. 96-1814 (*en banc*), slip op. at 33 (4th Cir. 1999) (footnote omitted).

In this case, federal prosecutors took control over the defendant *after* New York state authorities had arrested her. Petition for a Writ of Certiorari, p. 3. The facts of this case thus confirm the Fourth Circuit's impression that VAWA will effect a change in the allocation of resources that states devote to violent crime, an area where they retain *primary responsibility* under the Constitution. Accordingly, the Court should review the constitutionality of the crime of "interstate domestic violence," presuming, under the premises of the Domestic Violence Clause, that federal power does not include the power to regulate and control violent crime.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Thomas M. Fisher
300 N. Meridian Street
Indianapolis, Indiana 46204
(317) 237-0300

Counsel for Amicus Curiae
Texas Justice Foundation

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